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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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| **NATHAN KEVIN TURNER,**<br><br>Plaintiff,<br><br>**v.**<br><br>**B. DUMANIS, et al.,**<br><br>Defendant. | Case No. 08CV0360 W (RBB)<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT BROWN'S MOTION TO DISMISS**<br><br>Hearing: June 23, 2008<br>Time: 10:00 a.m.<br>Judge: Hon. Ruben B. Brooks<br><br>(Oral Argument Not Requested) |

**INTRODUCTION**

Plaintiff is a state inmate serving a lengthy prison term for multiple counts of robbery, rape, burglary, and peeping against several victims. (Complaint at 4.) He claims that Defendants violated his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments because they have denied him the opportunity after his criminal trial to re-test DNA evidence collected in conjunction with his 1982 prosecution. Plaintiff contends this evidence would prove his innocence. Plaintiff requests equitable relief including a search for all DNA evidence, appointment of counsel to assist with the search for the DNA evidence, investigation into the destruction of DNA evidence, and testing of the DNA evidence.

Defendant Attorney General Edmund G. Brown Jr. moves to dismiss the Complaint on the grounds that he had no involvement in Plaintiff's criminal prosecution or the handling of his DNA evidence; Plaintiff's claims are barred by the statute of limitations; Plaintiff's claims are barred under the favorable termination doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994), and Plaintiff's claims are barred by collateral estoppel.

**FACTS ALLEGED**

Plaintiff alleges that a jury found him guilty in 1982 of fifty-five counts of rape, burglary, robbery and peeping, involving eighteen victims. (Complaint at pp. 4-6.) Plaintiff received a prison term of 174 years and four months. (*Id.*) Plaintiff alleges that the biological evidence used against him at trial did not match Plaintiff's blood type or DNA and that if it were retested, would completely exonerate him. (*Id.*) Plaintiff was denied the opportunity to test or evaluate the evidence because his defense attorney never employed an expert or investigator to test it. Plaintiff's conviction was affirmed on appeal in 1983. (Complaint at pp. 6-7.) He subsequently challenged his conviction in federal court, starting with a habeas petition in the district court, appeal to the Ninth Circuit, and finally, a petition for review with the United States Supreme Court. (Complaint at pp. 8-9.) The trial court ordered the destruction of trial exhibits on August 6, 1987, and it was destroyed on February 22, 1987. (Complaint a p. 7.)

Plaintiff then proceeded to file several habeas petitions in state court in which he alleged that the trial court excluded exculpatory DNA evidence; requested the introduction of new DNA evidence; moved for DNA testing under California Penal Code sections 1405 and 1417.0, and requested appointment of counsel and a new trial. On September 2, 2003, Plaintiff was informed that Deputy Public Defender Susan P. Clemens was assigned to assist Plaintiff in the location and preservation of DNA evidence. Ms. Clemens learned that all evidence presented at Plaintiff's trial had been destroyed after the California Court of Appeal affirmed Plaintiff's conviction. (Complaint at pp. 10-14.) Plaintiff subsequently commenced another round of state habeas proceedings in 2005. (Complaint at p. 12.) The California Superior Court denied Plaintiff's motion for DNA testing under

Penal Code section 1405 on March 17, 2005, on the basis that Plaintiff failed to state a prima facie case under Penal Code section 1405. (Complaint at p. 19.) Plaintiff proceed with this claim before the California Court of Appeal, which denied his habeas petition. (Complaint at p. 20.) Plaintiff's petition for habeas corpus before the California Supreme Court was also denied. (*Id.*)

## LEGAL ARGUMENT

## I.

## PLAINTIFF FAILS TO STATE A CLAIM AGAINST ATTORNEY GENERAL EDMUND G. BROWN JR.

### A. Standard Under Federal Rule of Civil Procedure 12(b)(6)

A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955, 1964 (2007)). However, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. at 1964-65 (internal citations and quotations omitted).

The Court must assume the truth of the facts presented and construe all inferences from them in the light most favorable to the nonmoving party when reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002); *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 1191, 1200 (9th Cir. 2002). Where a person appears in propria persona in a civil rights case, courts must construe the pleadings liberally and afford the plaintiff any benefit of the doubt. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988).

However, courts should not "supply essential elements of the claim that were not initially pled." *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982); *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir.1997). Additionally, courts "are not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.1994).

**B. Plaintiff Has Pled No Facts Against Defendant Edmund G. Brown Jr. Demonstrating a Violation of Plaintiff's Rights.**

Plaintiff sues Defendant Edmund G. Brown Jr. as "the Attorney General of the State of California who resides over all." (Complaint at p. 4.) Because the Complaint is otherwise devoid of any allegations against the Mr. Brown, it appears Plaintiff is attempting to hold him liable because he is the Attorney General and for no other reason. Because there is no respondeat superior or vicarious liability under 42 U.S.C. section 1983, the Complaint fails to state a claim against Mr. Brown.

No liability for a federal civil rights violation may be based on respondeat superior or any other theory of vicarious liability. *Monell v. Dept. of Social Services of the City of New York, et al.*, 436 U.S. 658, 690-692 (1978); *Redman v. County of San Diego*, F.2d 1435, 1443, 1446 - 47 (9th Cir. 1991), *cert. denied, County of San Diego v. Redman*, 502 U.S. 1074 (1992); *Taylor v. List*, 880 F.2d 1041, 1045 (9th Cir. 1989); *see Hansen v. Block,* 885 F.2d 642, 645-646 (9th Cir. 1989) (rejecting supervisory liability based on alleged failure to train). The Civil Rights Act provides for relief *only* against those who, through their personal involvement or failure to perform legally required duties, caused the deprivation of another's constitutionally protected rights. *Leer*, 844 F.2d 628, 33 (9th Cir.1988). A plaintiff must specifically allege the causal link between the supervisor and the claimed constitutional violation. *Monell*, 436 U.S. at 694; *Rizzo v. Goode*, 423 U.S. 362, 377 (1976); *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979). "A supervisor is liable for the constitutional violations of subordinates 'if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.'" *Hydrick v. Hunter*, 449F.3d 978 (9th Cir. 2006); *Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir. 2000) (involving police supervisors and commissioners).

Here, Plaintiff has not alleged that the Attorney General had anything to do with his criminal prosecution or the alleged destruction of his DNA evidence. Because simply being the Attorney General is not enough to impose liability, Edmund G. Brown Jr. should be dismissed from this action.

### C. This Action Is Barred By the Statute of Limitations Because Plaintiff Has Known About His Claims Since 1982.

Section 1983 actions are governed by the state statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *Azer v. Connell*, 306 F.3d 930, 935 (9th Cir. 2002.) California's statute of limitations for personal injury, California Code of Civil Procedure section 335.1, was increased from one to two years, effective January 1, 2003. *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004). However, this extension of the limitations period does not apply retroactively, except as to victims of the September 11, 2001 terrorist attacks. *Id.* at 955. Therefore, it does not apply to claims in which the former one-year statute of limitations has already run. *Id.; see also Douglas Aircraft Co., Inc. v. Cranston*, 58 Cal.2d 462, 467 (1962).

Because Plaintiff is an inmate, under California law he is entitled to a two-year tolling of the statute of limitations. As with statutes of limitation, federal courts apply the forum state's equitable tolling law when not inconsistent with federal law. *See Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). Under California law, a prisoner may receive tolling of the statute of limitations for up to two years while he is incarcerated. Cal. Code Civ. Proc. § 351.1.

Here, Plaintiff's claims accrued no later than the date of his conviction on March 22, 1982. Plaintiff claims that during his prosecution in 1982, the district attorney and police failed to turn over exculpatory biological evidence which they knew would prove Plaintiff's innocence. Plaintiff demonstrates he was aware of this issue when he appealed this conviction; however, he claims that he was "untrained in the law he did not know how to present this issue." (Complaint at p. 6.) Thus, Plaintiff's claims accrued on March 22, 1982, when he became aware of his claims, and expired three years later, on March 22, 1985. Because Plaintiff's claims expired more than twenty-three years ago, they are barred by the statute of limitations.

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**D. Plaintiff's Claims Are Barred Under the Favorable Termination Doctrine Because They Implicate the Validity of His Conviction.**

When a prisoner challenges the legality or duration of his confinement, or raises constitutional challenges which could entitle him to an earlier release, his exclusive federal remedy is a writ of habeas corpus. *Edwards v. Balisok*, 520 U.S. 641, 649 (1997); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (holding that sole remedy in federal court for a prisoner seeking restoration of good time credits is a writ of habeas corpus); *Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir. 1997) (concluding that a challenge to proceeding used in denial of parole necessarily implicated validity of denial of parole and had to be brought under habeas corpus procedures). In *Heck v. Humphrey*, the Supreme Court held that a prisoner's claim for damages for unconstitutional conviction or imprisonment was not cognizable under section 1983 if a judgment in favor of the prisoner would necessarily imply the invalidity of his conviction or sentence, unless the prisoner could demonstrate that the conviction or sentence had been previously invalidated. *Heck,* 512 U.S. at 487.

In *Edwards v. Balisok*, the Supreme Court further clarified the *Heck* holding, stating that the determination of whether a challenge is properly brought under § 1983 must be based upon whether the nature of the challenge to the procedures is such as necessarily to imply the invalidity of the judgment. If the court concludes that the challenge would necessarily imply the invalidity of the judgment of continuing confinement, then the challenge must be brought as a petition for writ of habeas corpus, not under § 1983. *Id.* at 648; *see also Butterfield*, 120 F.3d at 1024.

Recently, the Supreme Court again clarified this rule holding: "a state prisoner's § 1983 action is barred (absent prior invalidation)-no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)-*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81-2 (2005).

Here, Plaintiff is challenging the alleged withholding and destruction of exculpatory DNA evidence which Plaintiff contends would prove his innocence. Plaintiff specifically contends that his constitutional rights were violated because, "by refusing to search for and provide evidence for

DNA testing, defendant has deprived plaintiff the opportunity to show he is innocent of the crimes for which he is incarcerated." (Complaint at p. 21.) Thus, success in this action "would necessarily demonstrate the invalidity of confinement." And, as the Complaint shows, Plaintiff's habeas challenges to the withholding of this evidence have been unsuccessful. Accordingly, Plaintiff is precluded from pursuing these challenges to his conviction through 42 U.S.C. section 1983 and his Complaint should be dismissed. *See Wilkinson,* 544 U.S. 74.

**E. Plaintiff's Claims Are Barred by Collateral Estoppel, Because He Previously Litigated Them in Numerous Habeas Corpus Proceedings.**

The decision of a state court on federal claims precludes relitigation of the matter in federal court. "A federal court has no jurisdiction to determine constitutional issues already submitted to and determined by a state court." *Paul v. Dade County,* 419 F.2d 10, 12 (5th Cir. 1969). Thus, Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the court of the state from which the judgments emerged would do so. *Allen v. McCurry,* 449 U.S. 90, 94-96 (1980); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

The Ninth Circuit has held that this rule applies to preclude a party from relitigating a matter under Section 1983 if that matter was already decided in a California state habeas proceeding. *Silverton v. Department of Treasury of the United States of America*, 644 F.2d 1341 (9th Cir. 1981) (because of the nature of California habeas proceeding, a decision actually rendered should preclude an identical issue from being relitigated in a subsequent federal civil rights action if the state court afforded a full and fair opportunity for the issues to be heard); *Sperl v. Deukmejian*, 642 F.2d 1154, 1155 (9th Cir. 1981); *see also Hawkins v. Risley*, 984 F.2d 321 (9th Cir. 1993) (holding prior judgment in federal habeas corpus proceeding may have preclusive affect in action brought under Section 1983).

State law governs the application of collateral estoppel to a state court judgment in a Section 1983 action. *Allen*, 449 U.S. at 96. California applies collateral estoppel when the following conditions are met: "First, the issue sought to be precluded from relitigation must be identical to that decided in the former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." *Lucido v. Superior Court*, 51 Cal. 3d 335, 341, 272 Cal. Rptr. 767 (1990) (citing *People v. Sims,* 32 Cal. 3d 468, 484, 651 P.2d 321, 186 Cal. Rptr. 77 (1982)).

Here, all the elements of collateral estoppel are met. Plaintiff claims he filed a habeas petition in California Superior Court, case no. HC14929, raising "a claim concerning 'the introduction and use of DNA evidence.'" (Complaint at p. 9.) The petition was denied. (*Id.*) Plaintiff claims he then filed a petition for writ of habeas corpus in the California Court of Appeal, Fourth District, case no. D029361, again claiming the trial court excluded exculpatory DNA evidence. "The Court found Plaintiff did not present a prima facie case." (Complaint at p.9.) Plaintiff also filed "a Motion to Introduce New DNA evidence," by way of a habeas petition in superior court, case no. HC14929, but his was also denied. (Complaint at p. 9.) Plaintiff apparently filed another petition for writ of habeas corpus and motion for DNA testing in the superior court, which was denied on March 17, 2005, for failure to meet the prima facie elements under Penal Code section 1405. (Complaint at p. 19.) Plaintiff again brought his claims in the California Court of Appeal and Supreme Court, but these habeas petitions were again denied, this time on procedural grounds. (Complaint at p. 20.) Accordingly, Plaintiff has exhaustively litigated his claims in state court and has received final judgment on the merits. He is apparently suing all Defendants as representatives of "the People"; thus, the privity element is also met. Because Plaintiff has fully litigated his claims by way of petition for writ of habeas corpus in state court, collateral estoppel precludes him from relitigating them in federal court.

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## CONCLUSION

The Court should dismiss the Complaint with prejudice as to Defendant Edmund G. Brown Jr. because it fails to state a claim against Mr. Brown and is barred by the statute of limitations, the favorable-termination doctrine and collateral estoppel.

Dated: May 20, 2008

Respectfully submitted,

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# DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Turner, Nathan Kevin v. B. Dumanis, et al.**

Case No.: **08CV0360 W (RBB)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On May 20, 2008, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT BROWN'S MOTION TO DISMISS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

Nathan Kevin Turner
CDC # C-44886
California Medical Facility
P.O. Box 2000
Vacaville, CA 95696-2000
In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 20, 2008, at San Diego, California.

J. Yost — Declarant

[signature] — Signature

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